with it an assurance to the public that one who has been admitted to the bar is competent, intellectually and morally, to take charge of the interests which clients may be expected to intrust to him. That it is to the very great interest of the public that admission to the bar should carry with it the strongest possible assurance of actual fitness on the part of the person admitted is a remark so evident, so trite, that one hesitates to write it down, but we sometimes lose sight of the fact that such assurance can be given through the combined action of the court and the law schools, and that to do so is a solemn duty which they owe to the public.

HENRY BUDD.

RECENT AMERICAN DECISIONS.

Texas Court of Appeals.

EX PARTE ASHER.

The Texas Act, imposing an occupation tax upon traveling merchants "drummers," or solicitors of trade by sample or otherwise, does not contravene the clause of the Federal Constitution providing for the regulation of commerce between the States by Congress.

Robbins v. *Taxing District*, 120 U. S. 489, disapproved.

ORIGINAL application for writ of *habeas corpus* to Court of Appeals.

The opinion states the facts.

John A. Kirlicks, for petitioner.

Assistant Attorney-General Davidson, for the State.

WHITE, P. J.—This is an original application to this court for the writ of *habeas corpus*, in which it is alleged that the applicant is illegally restrained of his liberty for failure and refusal to pay a fine of $35 imposed upon him by a justice of the peace of Harris county, on the charge of pursuing the occupation of a commercial traveler, drummer, or solicitor of trade by sample, without having paid the occupation tax prescribed by law on said occupation.

It is admitted that applicant is a citizen of Louisiana, and

that he did pursue such occupation in Harris county, State of Texas, without having paid said occupation tax. It is admitted that the law has been violated, as charged. But it is alleged that the statute law of the State of Texas, under which petitioner was tried and is restrained in his liberty, is unconstitutional and void, in that it is in violation of, repugnant to, and contravenes the interstate commerce clause of the Constitution of the United States. Thus it will be seen that a direct attack is made upon the constitutionality of our State law which regulates the matter, and the question of its constitutionality is the only one to be determined in this proceeding. We find the statute complained of contained in chapter 17, Gen. Laws Called Sess. 17th Leg. pp. 18, 19, *et seq*, and the particular provision attacked, which is in part an amendment to article 4665, Rev. St., reads as follows, viz.:

"From every commercial traveler, drummer, salesman, or solicitor of trade by sample or otherwise, an annual occupation tax of $35, payable in advance, provided, that the tax herein required to be paid by such commercial traveler, drummer, salesman, or solicitor, shall be paid to the comptroller of public accounts, whose receipts, under seal, shall be evidence of the payment of such tax; and provided, further, that no county, city, or town shall levy or collect any occupation tax upon such commercial traveler, drummer, salesman, or solicitor: provided, that nothing herein contained shall apply to any one soliciting subscriptions for religious, literary, or historical books or maps, or to persons soliciting for nurseries, newspapers, and gravestones: provided, further, that every commercial traveler, drummer, salesman, or solicitor of trade shall, on demand of the tax-collector of any county of the State, or of any peace officer of said county, exhibit to such officer the comptroller's receipt above mentioned; and every commercial traveler, drummer, salesman, or solicitor of trade who shall fail or refuse to exhibit said receipt to such officer on demand by him shall be deemed guilty of misdemeanor, and fined in a sum not less than $25 nor more than $100."

This is a general law, and an infraction of its provisions is expressly declared to be a misdemeanor punishable by fine. Another of our general statutes provides that in misdemeanor

cases, where a party has been legally tried and fined, he may be imprisoned in the county jail until said fine and costs are paid; so that, if the statute in question be constitutional, a party convicted for its violation may suffer conjointly both fine and imprisonment.

It is urgently contended that this statute is in conflict with article i, § 8, subd. 3, Const. U. S., which declares that Congress shall have the power "to regulate commerce with foreign nations *and among the several States* and with the Indian tribes;" and we are most confidently cited by counsel for applicant, in support of this position, to the case of *Robbins* v. *Taxing District Shelby Co.* (recently decided by the Supreme Court of the United States, March 7, 1887), in which it was, in substance, held that "a statute imposing a license tax upon drummers and others selling by sample within a certain taxing district is a regulation of interstate commerce, and therefore unconstitutional as applied to citizens of other States."

We are free to admit that a majority of the court, in that case, so held the law to be. We are free to admit that, if the decision of the majority be correct, it settles the law of this case in favor of the position assumed for applicant. We are further free to admit that in all cases involving clearly and unquestionably the constitutionality and validity of State laws with reference to provisions of the Constitution of the United States, the decisions of the Supreme Court of the United States, clearly, certainly, and unequivocally expressed upon those questions, should and ought to be binding upon the State courts, because we fully recognize that "it is essential to the protection of the national jurisdiction, and to prevent collision between the State and National authority, that the final decision upon all questions arising in regard thereto should rest with the courts of the Union." Cooley, Const. Lim. (5th ed.) p. 16. But such decisions, no more than the decisions of the State courts, are or should be binding upon the latter, if in themselves unwarranted assumptions of constitutional authority—invocations of the Federal power, where such power does not and was never intended to apply and operate; and, moreover, where said decisions are directly in conflict with well-adjudicated cases of the same court, which are not overruled, and which, in addition to their equal

authority, are based upon fundamental and eternal principles of reason, justice, and right.

We do not propose to enter upon a discussion anew of the delicate and important question of interstate commerce—a question so often and so ably discussed in the debates upon the adoption of the Federal Constitution, when the patent defects of the Articles of Confederation, intended to be corrected, were directly present in the minds and experience of the framers of that instrument—a question so often discussed, much more ably than we could possibly hope to do, in the many adjudicated cases which have come under judicial investigation in the Supreme, Circuit, and District Courts of the United States, and courts of last resort in the various States of the Union, as well as in standard elementary treatises of recognized authority. On the contrary, we shall content ourselves with simply stating certain elementary principles of government involving the questions, and then cite the authorities bearing directly upon the issue presented in this case.

Mr. Cooley, in his work on the Law of Taxation, says: "The Federal Constitution also provides that Congress shall have power to regulate commerce with foreign nations and among the several States and with the Indian tribes. The Constitution and the laws made in pursuance thereof, being supreme over the several States, the power of the regulation cannot be interfered with, limited, or restrained by any exercise of State authority. When, therefore, it is held that the power to tax is at the discretion of the authority which wields it—a power which may be carried to the extent of an annihilation of that which it taxes, and therefore may defeat and nullify any authority which may elsewhere exist for the purpose of protection and preservation—it follows as a corollary that the several States cannot tax the commerce which is regulated under the supremacy of Congress. But a tax on property that may be the subject of commerce under congressional regulation is not a tax on commerce." Page 62. As to the general power of taxation of business, the learned author says: "Government may, in the discretion of its legislature, levy a tax on every species of property within its jurisdiction; or, on the other hand, it may select any species of property, and tax that only. The same is true of occupations—government

may tax one, or it may tax all. There is no restriction upon its power in this regard, unless one expressly imposed by the Constitution." Id. 384. Again, he says: "A tax on the privilege of following any particular employment is usually confined to those which in some particular are exceptional, either because supposed to be especially profitable, or because they require special regulations, or because the privilege is in the nature of a franchise, or because they supply a general demand; so that the burden imposed will be generally distributed. But no employment is absolutely exempt from the liability to be taxed. The necessities of the government may require that the lowest employment, as well as the most lucrative, shall contribute to its support; and, if any is exempted, motives of policy will govern the discrimination. When the tax takes the form of a tax on the privilege of following an employment, convenience in collecting will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the taxes as a condition to the right to carry on the business at all. In such a case the business carried on without a license will be illegal, and no recovery can be had upon contracts made in the course of it." Id. 385.

In his invaluable work on Taxation, Mr. Desty sums up the doctrine thus: "A law imposing a license tax on transient persons doing business within the State does not violate the provisions of the Federal Constitution. Transient persons selling goods within the State by wholesale or retail, on land or on water, are liable to pay a license tax. To authorize a person to sell foreign merchandise without a license, he must have received it in exchange for articles of his own manufacture or for productions of his own agriculture. The mere fact that a clerk, merchant, or other person solicits orders or favors in his business does not necessarily bring him within the law authorizing a license tax to be imposed upon solicitors. The law means persons engaged in that particular class of business for a profit or as a means of livelihood. * * * * A drummer or a commercial traveler is not a peddler, because he does not carry with him the goods sold. A State law imposing a license fee upon merchants who go from place to place soliciting orders is not unconstitutional as involving a duty or impost on imports,

or a regulation of commerce, or unequal taxation; it is a legitimate tax on business." 2 Desty, Tax'n, 1389, 1390.

We will now cite some of the State decisions involving this question.

In *Ward* v. *Maryland*, 31 Md. 279, it was held "that it is within the power of the State to tax, in the shape of a license, any trade, business, or occupation, when carried on in its borders by those who are not permanent residents of the State, whether foreigners or citizens of other States; that, even if this law is to be regarded as restrictive [as to non-residents] and discriminating [in favor of her own citizens] in its character and design, it still simply imposes a tax on a particular business carried on in a particular mode within the limits of the State, which it is perfectly competent for the legislature to regulate and restrain." That case was carried to the Supreme Court of the United States, and its disposition therein will be noticed hereafter.

In *Cole* v. *Randolph*, 31 La. Ann. 535, it was held "that the law imposing a license tax on transient persons doing business within the State does not violate that provision of the Constitution of the United States vesting in Congress the exclusive power to regulate commerce among the several States."

In *Sears* v. *Board Com'rs Warren Co.*, 36 Ind. 267, it was held that the provision contained in "An Act concerning licenses to vend foreign merchandise," etc., which required a license fee to be paid by traveling merchants and peddlers who are not residents of the State to vend foreign merchandise, is not in conflict with the interstate commerce clause in the Constitution of the United States.

In *Robbins* v. *Taxing District*, 13 Lea 303, it was held that the law providing that drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, and merchandise therein by sample, shall be required to pay a specified privilege tax, is constitutional and valid. This case went to the Supreme Court of the United States, and its reversal is the decison applicant relies on here.

Let us now cite some of the leading cases decided in the United States District and Circuit Courts.

In re Rudolph was from the Circuit Court of the District of

Nevada. It was therein held that a statute of Nevada which provided that every traveling merchant, agent, or drummer, or other person selling or offering to sell any goods, wares, or merchandise of any kind to be delivered at some future time, or carrying samples, and selling or offering to sell goods, wares, or merchandise of any kind similar to such samples, to be delivered at some future time, should procure a license, etc., and further providing that any person pursuing such occupation without license should be guilty of a misdemeanor, did not violate the constitutional provisions relative to laying duties or imposts on imports and interstate commerce. 2 Fed. Rep. 65.

In a most elaborate and well-considered opinion in *Ex parte Thornton*, in the Circuit Court for the Eastern District of Virginia, HUGHES, J., cites and reviews all the leading cases, and his conclusions as stated in the syllabus are: "If the legislature of a State frames a law relating to merchants and sample merchants, with the intention to discriminate against non-residents in favor of residents, and against goods in other States sold by sample in favor of goods held within the State for sale, and if the legislation has this practical effect, then such provisions are null and void, and all arrests and prosecutions under them are illegal. The legislature has the right to discriminate against sample merchants in favor of merchants, the State being sovereign mistress of her own policy in determining what classes she shall levy a license tax upon, and what classes she shall exempt from such taxation, and in deciding how lightly or how heavily she shall make such tax. The assumption that a merchant is necessarily a resident, and that a sample merchant is necessarily a non-resident, is an arbitrary one, and one which a court of justice has no right, by mere inference, to accept as true. It is only when a law discriminates against a foreign resident of a certain class, or against the goods held in another State for sale, in favor of a resident of the same class, and goods held within the State for sale, that it is obnoxious to the provisions of the National Constitution in relation to the privileges and immunities of citizens of the several States, or the regulation of commerce with foreign nations and among the several States, or the prohibition of laying imposts or duties on exports or imports." 12 Fed. Rep. 539.

In *Memphis & L. Rd.* v. *Nolan* (Circuit Court, Western District of Tennessee) it was held that "a license or privilege tax imposed by a State on the business of an express company, engaged solely in commerce between the States, where there is no intention by this means to obstruct or prohibit the business, is not unconstitutional." The learned judge, delivering the opinion, says: "As I read the cases, the principle is that so long as it is not a direct tax on property carried in the commerce between the States, imposed either on the goods, or indirectly collected from them, and is only a tax on the franchise granted to the carrier in consideration of the grant, or, what is the same thing, a tax or tribute demanded for the privilege of doing the business, the prohibition of the Constitution does not apply. Of course, in analogy to our State adjudications, if, under the disguise of taxing a franchise or privilege, the State should undertake by excessive taxation to obstruct or prohibit the business of interstate commerce, the constitutional provision would protect against it." 14 Fed. Rep. 532.

We might cite many other authorities which upon principle are in alignment with the foregoing, taken from elementary authors, and from the State and subordinate Federal courts; but these are sufficient to serve to illustrate the unanimity with which the question has been settled in so many various tribunals of standing and ability, inferior to none in the country. Another fact connected with these decisions is the unanimity *and confidence* with which they cite and rely upon decisions of the Supreme Court of the United States in support of the conclusions they announce. This becomes passingly singular when the *Robbins Case*, here relied on, states an entirely different and contradictory rule; and that, too, without overruling previous decisions of the same court in diametrical opposition to it.

Let us cite some of these decisions.

In *Nathan* v. *Louisiana*, Justice McLEAN says: "Now, the Federal government can no more regulate the commerce of a State than a State can regulate the commerce of the Federal government. * * * The taxing power of a State is one of the attributes of sovereignty; and when there has been no compact with the Federal government, or cession of the jurisdiction for the purposes specified in the Constitution, this power reaches

all the property and business within the State which are not properly denominated the means of the general government, and, as laid down by this court, may be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the legislature to their constituents. If this power of taxation by a State within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of the State may be thereby essentially impaired. But State power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions named, is subject to its laws, and also numberless enterprises in which its citizens may be engaged. These are subjects of State regulation and State taxation, and there is no Federal power under the Constitution which can impair this exercise of State sovereignty." 8 How. 73. Same doctrine is declared in *City of New York* v. *Miln*, 11 Pet. 102.

In *Gibbons* v. *Ogden*, 9 Wheat. 203, the court, in commenting on inspection laws, uses this language: "They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, are a component part of this mass. * * * No direct general power over these objects is granted to Congress, and consequently they remain subject to State legislation." See also *License Cases*, 5 How. 504.

In *Woodruff* v. *Parham*, 8 Wall. 123, it was held that "a uniform tax imposed by a State on *all* sales made in it, whether they be made by citizens of it, or citizens of some other State, and whether the goods sold are the produce of that State enacting the law, or of some other State, is valid." This doctrine was reaffirmed in *Hinson* v. *Lott*, Id. 148, where the same State statute was involved; and, after discussing the validity of the statute, that profound jurist, Mr. Justice MILLER, concluded his opinion by saying: "As the effect of the act is such as we have

described, and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State."

When the case of *Ward* v. *Maryland, supra,* came before the Supreme Court, the judgment of the State court was reversed, and the act declared invalid—not, indeed, as in contravention of the interstate commerce provision, but because it imposed a discriminating tax upon non-resident traders trading in the limits mentioned, and that it was *pro tanto* repugnant to the Federal Constitution and void. The provision of the Constitution which was violated was that which guaranteed and secured to the citizens of each State all privileges and immunities of citizens in the several States (Const., art. iv, § 2). 12 Wall. 418. Mr. Justice BRADLEY alone dissented, he being of opinion that the act violated the interstate commerce clause, and that it would so do, "although it imposed upon residents the same burden for selling goods by sample as is imposed upon non-residents."

In the subsequent case of *Osborne* v. *Mobile,* 16 Wall. 479 (opinion by Chief Justice CHASE), it is said: "It is as important to leave the rightful powers of the State in respect to taxation unimpaired, as to maintain the powers of the Federal government in their integrity." He further says, speaking of the decision in the case of *State Tax on Railway Gross Receipts,* 15 Wall. 284: "The whole court agreed that a tax on business carried on within the State, and without discrimination between its citizens and the citizens of other States, might be constitutionally imposed and collected."

These two last cases are directly in point. They were decided by a unanimous court. They are not overruled in *Robbins* v. *Taxing District,* relied upon by applicant in this case. They are directly in conflict with the *Robbins Case,* and the *Robbins Case* is simply the opinion of a majority, and not of the whole court. WAITE, C. J., in, to our minds, an unanswerable opinion, concurred in by those profound and eminent jurists, FIELD and GRAY, dissented from the doctrine announced. Under such circumstances we do not feel bound by the Robbins decision, and,

not believing it to be the law of this land, we will not consider it as of binding force upon us.

As conclusive as is to our minds the able dissenting opinion of the chief justice, there are one or more views of the case which he did not elaborate, and which, in our opinion, should condemn the doctrine announced.

The strongest position tending to support the doctrine of the *Robbins Case* is, perhaps, that taken in *Brown* v. *Maryland*, 12 Wheat. 419. It was there said: "Any charge on the introduction and incorporation of the articles [of commerce] into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means of accomplishing that introduction and incorporation." The result of the reasoning in that case was, says Judge STORY, "that whatever restrains or prevents the introduction or importation of passengers or goods into the country, authorized and allowed by Congress, whether in the shape of a tax or other charge, or whether before or after their arrival in port, interferes with the exclusive right of Congress to regulate commerce." Dissenting opinion in *City of New York* v. *Miln*, 11 Pet. 161. Now for the application of this doctrine to the *Robbins Case*. In the opinion of a majority of the court, it is conceded that the Tennessee law is not obnoxious to constitutional objection, either Federal or State, in so far as citizens of Tennessee are concerned; and that as to them it may be legally and rigidly enforced—enforced by criminal prosecution, accompanied with appropriate fines and penalties. In other words, that, as to citizens of Tennessee, it matters not that the action of the State may allow them to restrain and prevent the introduction of goods into the country and be valid, the same action is invalid as to citizens of other States, merely because they are citizens of other States. Such doctrine, to say the least of it, is anomalous, if not paradoxical.

Again, as stated in the beginning of this opinion, our statute makes it a misdemeanor for a person to pursue the occupation of a drummer, commercial traveler, or salesmen by sample, without having first paid a license therefor. To do so is a criminal offense. In the *Robbins Case*, under a law of similar character,

it is conceded that the State had the right to pass and enforce such law against its own citizens. But the startling doctrine is announced that this same law is invalid and unconstitutional, and incapable of enforcement as to persons not citizens of the State, who invade its territority and wantonly violate said law within its jurisdiction; in other words, that a general law of a State, penal in character, and violative of neither the Federal nor State Constitution, is binding upon none save its own citizens. We have been accustomed to accept as elementary truth the doctrine that criminal laws are not respecters of persons, nor, indeed, can be, and that as to them no class of individuals may claim special immunity. Upon this subject, the Supreme Court of the United States, in *City of New York* v. *Miln*, emphatically say: "No one will deny that a State has a right to punish any individual found within its jurisdiction who shall have committed an offense within its jurisdiction against its criminal laws. We speak not here of foreign ambassadors, as to whom the doctrines of public law apply. We suppose it to be equally clear that a State has as much right to guard by anticipation against the commission of an offense against its laws, as to inflict punishment upon the offender after it shall have been committed. *The right to punish or to prevent crime does in no degree depend upon the citizenship of the party who is obnoxious to the law.*"

The Constitution of the United States provides: "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The doctrine of the *Robbins Case* goes further. It puts a premium upon non-citizenship, by discriminating in its favor against citizenship, and conferring upon it privileges and immunities which are denied to the citizens of the State. To such a doctrine we cannot yield our assent.

In conceding that the Tennessee law was constitutional and binding as to the citizens of that State, it occurs to us that the majority opinion in the *Robbins Case* virtually and in fact conceded whatever of merit there was in any question involved in that case on the appeal, and that the concession and conclusion reached are directly at variance. To nullify such a State law by judicial action is, in our opinion, to exercise, to say the least, a doubtful power, if it is not a direct usurpation of unauthor-

ized power, warranted neither by the letter nor the spirit of the constitutional provision invoked to sustain it. The fact that the law may and does affect more citizens of other States than of the individual State is no criterion by which to judge of its constitutionality or validity. Whenever her own citizens are or may be equally affected, we deny that courts of Federal jurisdiction may question the motives of the State legislature in the passage of the act, much less declare it unconstitutional.

The statute we are construing, and which, in this proceeding, we are asked to hold unconstitutional, is a general law of equal application to the entire State, and *pro tanto* is less objectionable than the Tennessee law, which applied only to a taxing district. It would, in our judgment, be a strained construction which would hold this law unconstitutional, within the spirit, much less the letter, of the provision of the Federal Constitution regulating *commerce between the States.*

So believing, we are of opinion that the relator is not illegally restrained of his liberty by virtue of his conviction and imprisonment for a violation of this law. He is therefore remanded to the custody of the sheriff of Harris county; and it is ordered that applicant pay all the costs incurred in this court by reason of this proceeding. Ordered accordingly.

There is much apparent discord in the adjudications, arising from the interpretation of the foreign and interstate commerce clause of the Federal Constitution. The doctrine of the principal case is in direct conflict with recent decisions of the United S ates Supreme Court, as well as with late decisions of State courts of last resort, as will be hereafter shown.

The Federal Constitution confers upon Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Art. i, § 8, 3d par. The point of difficulty seems to be as to what constitutes such commerce.

A few illustrative cases will be given. A provision in a State charter to a railroad company that the company shall pay a bonus on a portion of its earnings to the State from time to time, is valid, as a State has power to impose conditions upon its own grants to corporations: *R. R. Co.* v. *Maryland*, 21 Wall. 456. So the Iowa Act of March 23, 1874, to establish reasonable ma imum rates of charge for the transportation of freight and passengers on the various roads within the State is valid, not being a regulation of interstate commerce: *R. R. Co.* v. *Iowa*, 94 U. S. 155. See *Peik* v. *R. R. Co.*, Id. 164. But a tax upon the transportation of passengers may be a tax upon commerce. Hence, a state law which requires the masters of vessels en-

gaged in foreign commerce to pay a specified sum to a State officer for every passenger brought from a foreign country into the State is unconstitutional: *Smith* v. *Turner*, 7 How. 233. See *Chy Lung* v. *Freeman*, 92 U. S. 275; *In re Ah Fong*, 13 Am. L. Reg. 761; 3 Sawy. 144; *Henderson* v. *Mayor of N. Y.*, 92 U. S. 259. And a State tax upon the gross receipts of a steamship company, incorporated under its laws, which are derived from the transportation of persons and property by sea between different States and to and from foreign countries, is a regulation of interstate commerce, and therefore void: *Phila. Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. This case questions the decisions of State Freight Tax, 15 Wall. 232. See *Indiana* v. *Am. Ex. Co.*, 7 Biss. 227. So a State statute which levies a tax upon the gross receipts of a railroad for the carriage of freight and passengers into, out of, or through the State, is a tax upon commerce among the States and therefore void: *Fargo* v. *Michigan*, 121 U. S. 230. See the *Reading R. R. Co.* v. *Penn.*, 15 Wall. 232, which contains a full discussion of this question. So a statute attempting to regulate the rate of compensation for transportation of freight from New York to Peoria, Ill., or from Peoria to New York, is a regulation of commerce among the States: *Wabash Ry. Co.* v. *Illinois*, 118 U. S. 557. See *Crandall* v. *Nevada*, 6 Wall. 35; *Carton* v. *Ill. Cent. R. R.*, 59 Iowa 148; *Hardy* v. *A. T. S. F. R. R.*, 32 Kans. 698.

Laws which require one who peddles articles grown or manufactured in a foreign country to have a license, is in conflict with § 8, art. i, of U. S. Const., as an attempt to regulate foreign commerce: *State* v. *Pratt* (S. C. Vt., May 28, 1887), 4 New Eng. Rep. 357. So the Missouri statute prohibiting the driving or conveying of any Mexican, Texas, or Indian cattle into the State, between March 1 and Nov. 1, in each year, involves an attempt to regulate commerce, and is, therefore, void: *R. R. Co.* v. *Husen*, 95 U. S. 465.

It also seems to have been a well-established test that a tax law or license law which does not discriminate between different persons engaged in the same calling, between foreign and domestic corporations, dealers, producers, and manufacturers of the same class, is not in derogation of the Constitution of the United States, simply because it imposes a greater burden upon one class of tradesmen, producers, manufacturers, or occupations, than another, as long as it does not discriminate between persons of the same class: *Machine Co.* v. *Gage*, 100 U. S. 676; *Webber* v. *Virginia*, 103 Id. 344; *Ex parte Thornton*, 4 Hughes, C. C. 220; s. c. 12 Fed. Rep. 539; *In re* Watson, 15 Id. 511, and note; *Brown* v. *Houston*, 114 U. S 622; *Walling* v. *Michigan*, 116 U. S. 446; Cooley on Taxation (2d ed.) 99. Thus, in *Ex parte Hanson* (D. C. Oregon), 28 Fed. Rep. 127, it was held that an ordinance of the city of Portland requiring every person who goes from place to place therein, soliciting the purchase of goods, without reference to the place of their product or manufacture, or offering to sell or deliver the same by sample or otherwise, to take out a license, does not, on its face, discriminate against the products of any State, and therefore it is not a regulation of commerce, but only a tax. DEADY, J., said: "A tax or charge for a license to sell goods is, in effect, a tax on the goods themselves:" *Welton* v. *Missouri*, 91 U. S. 278. It is now well settled that a

tax imposed by a State, directly or indirectly, on the products of another State when brought within its limits, or offered for sale therein, which, in effect, discriminates against said products and in favor of the State imposing the tax, is a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred on Congress by the Constitution of the United States *Ward* v. *Md.*, 12 Wall. 418; *Welton* v. *Mo.*, 91 U. S. 275; *Guy* v. *Baltimore*, 100 Id. 434; *Walling* v. *Michigan*, 116 Id. 446. On the other hand, where the tax or charge is imposed equally upon the products of the State imposing it and those introduced from other States, the law or ordinance imposing the same is not a regulation of commerce, but only a legitimate exercise of the taxing power of the State: *Woodruff* v. *Parham*, 8 Wall. 133; *Hinson* v. *Lott*, 8 Wall. 148; *In re Rudolph* 6 Sawy. 295; s. c. 2 Fed. Rep. 65; *Ex parte Robinson*, 12 Nev. 263. See also *District of Columbia* v. *Humason*, 2 McArth. 158. And in *Ex parte Thornton*, 4 Hughes C. C. 220; s. c. 12 Fed. Rep. 539, it is said that if a statute makes no distinction between resident and non-resident sample merchants, the latter cannot complain of a tax. A State levying a tax may discriminate between different classes of tradesmen, but cannot directly or indirectly discriminate in favor of her own citizens against residents of other States, nor in favor of goods held for sale within her own territory against goods held for sale in other States. *Seymour* v. *State*, 51 Ala. 52, seems to be a contrary decision. The State of Alabama passed a law requiring all persons engaged in business and professions mentioned in the act to take out a license. Afterward a law was passed making it lawful for all persons "to peddle and sell, without a license, all things made or manufactured by them" in the State of Alabama.

The defendant in this case peddled sewing-machines made in St. Louis, Mo., without taking out a license as provided in the first act. The court held that the law providing for a license was binding and that it was not affected by the subsequent acts, exempting from a license persons selling manufactured products of Alabama. The court said: "The most that can be said of the latter enactment is, that it is a law to encourage manufacturing in this State. * * * Here there is no discrimination. Every peddler in the mode mentioned pays the same license who pays any license at all." It is apparent that the law discriminates against goods of other States, and this decision seems to stand alone. In *Webber* v. *Virginia*, 103 U. S. 344, the law of Virginia requires agents for the sale of manufactured articles of other States to obtain a license to sell the same, for which a specific tax was required to be paid for each county in which a sale or offer of sale was made, but it did not require such license to be obtained by agents selling articles manufactured in Virginia if the agent acted for the manufacturer. In holding the law unconstitutional, the court said (p. 350): "Here there is a clear discrimination in favor of home manufacturers and against manufacturers of other States. Sales by manufacturers are effected chiefly through agents. A tax upon their agents while thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is to that extent a regulation of commerce in the articles

between the States. It matters not whether the tax is laid directly upon the articles sold or in the form of license for sale:" *Welton* v. *Missouri*, 91 U. S. 275, and *County of Mobile* v. *Kimball*, 102 Id. 691, cited and approved.

"A license fee exacted from dealers in goods not produced or manufactured in the State, before they can be sold from place to place within the State, is a tax upon the goods themselves, and inadmissible when no such fee is exacted from those who deal in goods produced or manufactured within the State:" Cooley on Taxation (2d ed., 95. To same effect is *State* v. *McGinnis*, 37 Ark. 362. See *Baker* v. *State*, 44 Id. 134; *New Home Sewing Machine Co.* v. *Fletcher*, Id. 139.

In *Speer* v. *Commonwealth*, 23 Gratt. (Va.) 936, it was held that a State statute requiring a license to be obtained by every person selling goods by sample who was not a "resident merchant," does not discriminate in favor of citizens of the State, for the reason that a man may be a resident citizen and not a resident merchant, and *vice versa*.

But the recent decision of the United States Supreme Court modifies this doctrine in its application to traveling merchants, agents, and drummers soliciting orders and customers by sample: *Robbins* v. *Shelby Taxing District*, 120 U. S. 489. In this case plaintiff in error was engaged in Memphis, Tennessee, in soliciting sale of goods of a Cincinnati, Ohio, firm, dealers in paper and other articles of stationery, and exhibiting samples for the purpose of effecting such sales —an employment usually denominated as that of a "drummer." There was, at the time the sales were made, a statute in force, applicable to the district, which provided that "all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares or merchandise therein, by sample, shall be required to pay the sum of ten dollars a week or twenty-five dollars per month for such privilege, and no license shall be issued for a longer period than three months." It was made a misdemeanor to violate the statute. Stats. Tenn., 1881, c. 96, § 16. Plaintiff in error was convicted by the trial court to pay a fine, which judgment was affirmed by the State Supreme Court: 13 Lea 303.

The question of the case, as stated by the Supreme Court, was "Whether it is competent for a State to levy a tax or impose any other restrictions upon the citizens or inhabitants of other States, for selling or seeking to sell their goods in such State before they are introduced therein." The court remarked: "To say that such a tax is not a burden upon interstate commerce, is to speak at least unadvisedly and without due attention to the truth of things."

The principles established by this case are: 1. That the Constitution having given to Congress the power to regulate commerce among the several States, that power is necessarily exclusive; the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions, and that any regulation of the subject by the States is repugnant to such freedom. 2. The only way in which commerce between the States can be legitimately affected by State laws is when, by virtue of its police power and its jurisdiction over persons and property within its limits, it provides for the security of life and property, or imposes taxes upon persons residing within the State, or belonging to its

population, or upon avocations pursued therein, not directly connected with foreign or interstate commerce. BRADLEY, J., proceeds: "But in making such internal regulations, a State cannot impose taxes upon persons passing through the State or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the State from abroad or from another State, and not yet become part of the common mass of property therein; and no discrimination can be made by any such regulation adversely to the persons or property of other States; and no regulation can be made directly affecting interstate commerce. Any taxation or regulation of the latter character would be an unauthorized interference with the power given to Congress over the subject."

The contention in the principal case, that to so hold is discriminating against domestic citizens, is well answered in this case: "To say that the tax," says BRADLEY, J., "if invalid as against drummers of other States, operates as a discrimination against drummers of Tennessee, against whom it is conceded to be valid, is no argument, because the State is not bound to tax its own drummers, and if it does so whilst having no power to tax those of other States, it acts of its own free will and is itself the author of such discrimination."

WAITE, C. J., and FIELD and GRAY, J.J., dissented on the ground that the license was in effect a tax on business, and as there was no discrimination between citizens of Tennessee and other States, the law was valid, citing *Osborne* v. *Mobile*, 16 Wall. 481. The *Robbins Case* has been cited and approved in *Corson* v. *Maryland*, 120 U. S. 502, 505; *Fargo* v. *Mich.*, 121 Id. 230, 246; *Ouachita Packet Co.* v. *Aiken*, 121 Id. 444, 447; *Philada. Steamship Co.* v. *Penna.*, 122 U. S. 326, 336; *Western U. Tel. Co.* v. *Pendleton*, 122 Id. 347, 357.

In *Corson* v. *Maryland*, 120 U. S. 502, it was held that the law of Maryland, which provided that "no person or corporation other than the grower, maker, or manufacturer shall barter or sell, or otherwise dispose of or shall offer for sale any goods, chattels, wares, or merchandise within this State, without first obtaining license in the manner prescribed," etc., is unconstitutional as applied to a drummer for a New York house, being an attempt to regulate commerce among the States.

The *Robbins Case* has been approved in very recent State decisions. The Supreme Court of Louisiana, in *Simmons Hardware Co.* v. *McGuire* (S. C. La. June, 1887), bases its decision upon the *Robbins Case*. Here the plaintiffs were domiciled and doing business in St. Louis, Mo., and in the prosecution of the same they imported their goods and wares into Louisiana for sale, in unbroken packages, through their traveling agents or drummers, who visited the State soliciting orders and customers and making sales by samples. The Louisiana law provided that "all traveling agents offering any species of merchandise in this State for sale, or selling by sample or otherwise, shall pay * * * a license of fifty dollars," etc. This was held to be an attempt to regulate commerce between the States, therefore repugnant to the Federal Constitution, and so far as such traveling agents as may represent principals domiciled in other States are concerned, the tax is null and void. It will be observed that the law contained no discriminating feature.

The Supreme Court of Nevada, in the very late case of *Ex parte Rosenblatt* (1887), also follows the *Robbins Case*. Here the petitioner was a traveling salesman or drummer, taking orders and selling goods for his principal, a California house. The act of Nevada made it a misdemeanor to exercise such occupation without having first obtained a license therefor. He was convicted in the lower court, and upon *habeas corpus* was discharged by the Supreme Court. After commenting upon the *Robbins Case*, the court observed: "The statute of Tennessee and that of this State do not materially differ. Neither imposes a tax upon citizens of other States that does not equally apply to its own citizens, nor is there any discrimination in either statute against other States or their products. The principles of the decision of the Supreme Court in the *Robbins Case* must be accepted as establishing the unconstitutionality of the statute under which the petitioner was convicted."

EUGENE MCQUILLIN.

St. Louis, Mo.

Supreme Court of Appeals of West Virginia.

BEVERLIN *v.* BEVERLIN.

Common-law marriages when contracted in this State are not recognized by our courts as valid.

No marriage contracted in this State is valid when it affirmatively appears that it has not been solemnized according to the requirements of our statutes on that subject, although the parties may thereafter have associated and cohabited together as husband and wife.

APPEAL and *supersedeas* from Circuit Court, Taylor County. Bill for divorce. The opinion states the case.

John W. Mason and *B. F. Martin*, for appellant.
S. P. McCormick, for appellee.

SNYDER, J.—Suit in equity, instituted November 20, 1884, by Elizabeth Beverlin against Israel A. Beverlin, in the Circuit Court of Taylor county, for a divorce *a mensa et thoro*, and for alimony. In the original bill the plaintiff alleged that she was lawfully married to the defendant in the State of Pennsylvania, in June, 1861; that at that time she was a widow, and her name was Elizabeth Foster, and that from the date of said marriage until October, 1884, she and the defendant lived, associated, and cohabited with each other as husband and wife; that in October, 1884, the defendant, by his harsh, cruel, and inhuman treatment, compelled her to abandon home and children, and has since refused to permit her to return, etc.